

1. The amendment filed September 15, 2009 after a decision by the Board of Patent Appeals and Interferences is not entered because *prosecution is closed and the proposed amendment was not suggested in an explicit statement by the Board under 37 CFR 41.50(c)*. As provided in 37 CFR 1.198, prosecution of the proceeding before the primary examiner will not be reopened or reconsidered by the primary examiner after a final decision of the Board except under the provisions of 37 CFR 1.114 (request for continued examination) or 37 CFR 41.50 without the written authority of the Director, and then only for the consideration of matters not already adjudicated, sufficient cause being shown.

2. The amendment filed September 15, 2009, *i.e.*, after the Board decision on September 2, 2009 is not entered for the reasons, *inter alia*, listed below:

(a) Applicant contended:

During the Applicant's argument, the Board raised that the "second section" of the Applicant's invention was a "resting support" and the Anson attachment was not resting support but this had not been raised in the prosecution. Applicant understood this to be a distinguishing feature between the claims of the present application and Anson.

Applicant will demonstrate herein that the claims, as amended, are patentable over Anson. Further, as Applicant indicated in the Appeal Brief at page 3, Applicant will file a terminal disclaimer to overcome the obviousness-type double patenting rejection upon the Examiner's allowance of the claims.

The Examiner respectfully submits that Applicant did not point out specifically where the support for the quoted statement: "[d]uring the Applicant's argument, the Board raised that the 'second section' of the Applicant's invention was a 'resting support' and the Anson attachment

was not resting support but this had not been raised the prosecution" may be found in the Record of Oral Hearing on August 13, 2009. As noted, an expert's opinion on the ultimate legal issue must be supported by some thing more than a conclusory statement. *In re Buchner*, 18 USPQ2d 1331, 1332 (Fed. Cir. 1991). If Applicant has evidence of such support, Applicant is respectfully suggested to specifically point out the line(s) and page(s) of the transcript of the oral hearing to provide such support;

(b) A review of the Record of Oral Hearing and the Board decision apparently shows that the Board did not make an explicit suggestion under 37 CFR 41.50(c) that if Applicant amends claim 14 to change the limitation: "the second section *for supporting* at least a portion of a vehicle operator's body" to "the second section *for providing resting support for* at least a portion of a vehicle operator's body," it would distinguish between the claims of the present application and Anson reference. In other words, the Board did not explicitly suggest that such changes in claim 14 would render this case in the condition for allowance as Applicant requested in the Remarks/Arguments on page 8 of the amendment;

(c) The new functional limitation "*for providing resting support*" raises new issues that would require further consideration and/or search under 35 USC 102 and/or 103 in view of Supreme Court decision in *KSR Int'l. Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1741 (2007). Please see MPEP § 2143.03 and note that the final rejection in this case was made on March 30, 2006 prior to *KSR* decision; and

(d) Applicant has not filed the terminal disclaimer as seen in the Remarks/Arguments on page 7 of the amendment. Therefore, the rejection under the judicially created doctrine of

obviousness-type double patent over the claims in co-pending Application 10/720,821 affirmed by the Board is still standing.

In view of the foregoing, the Examiner respectfully declines to enter the instant amendment pursuant to MPEP § 1214.07.

3. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Vinh T. Luong whose telephone number is 571-272-7109. The examiner can normally be reached on Monday - Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Richard Ridley can be reached on 571-272-6917. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Vinh T Luong/  
Primary Examiner, Art Unit 3656